BORA LASKIN LAW LIBRARY
3 1761 10084050 3

The materials produced herein are intended for the sole use of law students at the University of Toronto.

CASES AND MATERIALS ON FAMILY LAW

Volume 1

EDITED BY

BERNARD GREEN

1984 - 85

LAW LIBRARY

JAN 7 1985

FACULTY OF LAW
UNIVERSITY OF TORONTO

FACULTY OF LAW LIBRARY
UNIVERSITY OF TORONTO

The materials produced herein are intended for the sole use of law students at the University of Toronto.

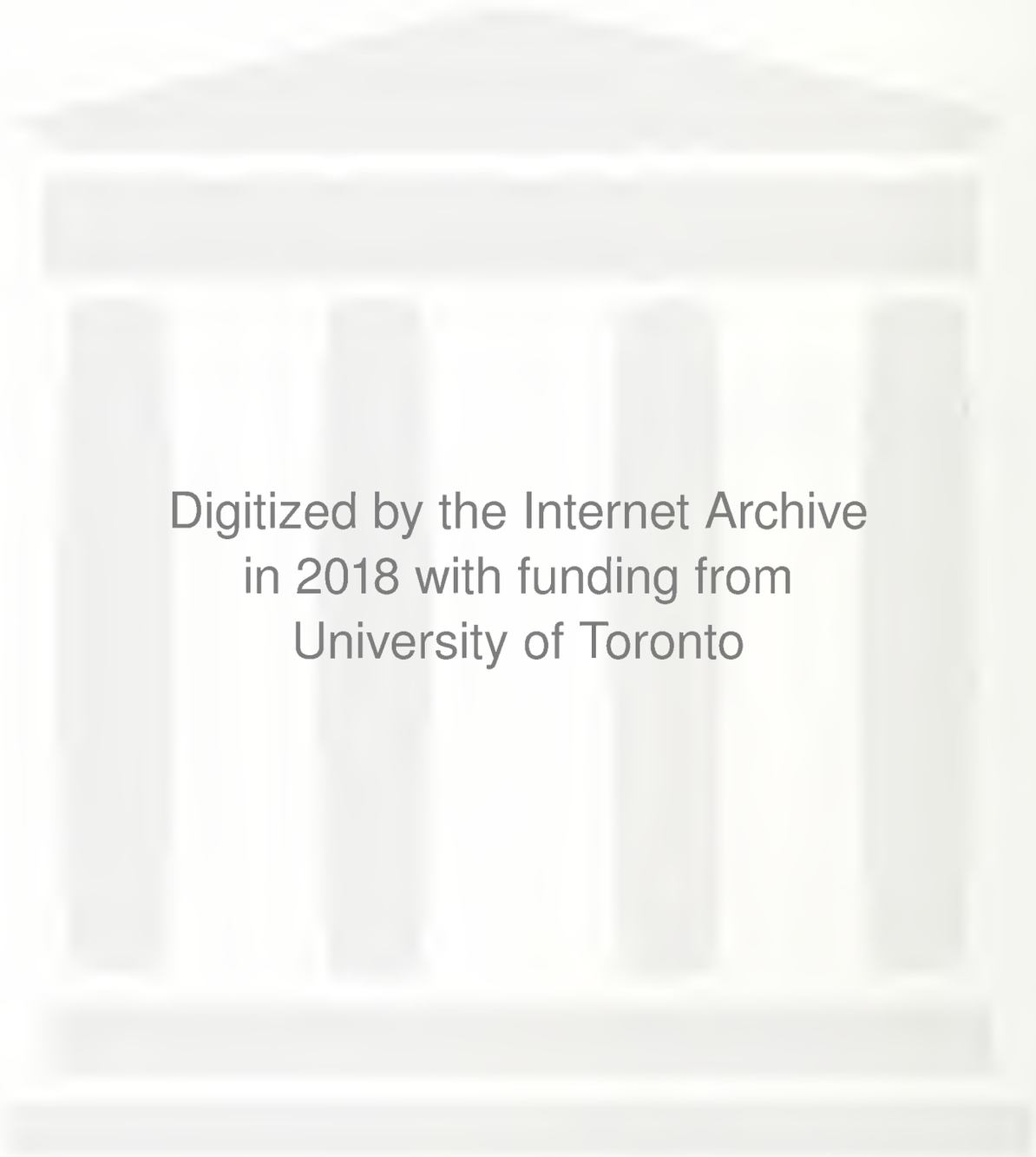
CASES AND MATERIALS ON FAMILY LAW

Volume 1

EDITED BY

BERNARD GREEN

1984 - 85


Digitized by the Internet Archive
in 2018 with funding from
University of Toronto

https://archive.org/details/casesmaterialson01gree_8

Table of Contents

CHAPTER ONE: INTRODUCTION

I. The Constitutional Framework: Division of Powers and Charter of Rights 2

Canadian Charter of Rights and Freedoms 3
U.S. Bill of Rights 4
Note on Impact of Charter of Rights on Family Law 4

II. The Legislative Framework 7

III. The Institutional Framework 7

A. The Courts 7

B. Other Agencies 8

C. The Lawyer 8

Reisman, "Beyond the Call of Obvious Duty" 8
Mnookin & Kornhauser, "Bargaining in the Shadow of the Law: The Case of Divorce" 11

IV. Some Views on the Family and Marriage 14

Eekelaar, Family Law and Social Policy 14
Sage, "Dissolution of the Family under Swedish Law" 22
Ryan, "Maintenance Obligations in the New Legal Concept of Marriage" 24
Posner, Economic Analysis of the Law 28

CHAPTER TWO: FORMATION OF THE FAMILY UNIT AND ANNULMENT

I. Introduction 33

II. The Constitutional Issue 34

Bushnell, "Family Law and the Constitution" 34

III. The Statutory Conditions 35

A. Licence and formalities 35
Marriage Act 35

B. Effect of failure to comply with statutory conditions 39

Marriage Act 39
Friend, "Common Law Marriage in Ontario" 40
Alspector 40
Friend, "Common Law Marriage in Ontario" 46

C. Age and parental consent 48
Marriage Act 49
Re Fox 50

IV. The Conditions Imposed by the Common Law 52

A. Introduction 52

B. A man and a woman 52

C. Who are free to marry 53

Marriage Act 54

Globe & Mail 57

D. Who consent to marry each other 58

(1) Mental Capacity 58

Marriage Act 58
Mailen v. Anderson 58
Chertkow v. Feinstein 59
Whitaker v. McNeilly 62
Webb 64
Re McGill 64

(2) Mistake as to the nature of the ceremony 67

Jiwani 67

(3) Mental reservations 69

Gardner 69
Iantsis 71

(4) Duress 72

Thompson 72
Truong (Malia) 77

(5) Fraud 78

Moss 78
H. v. C. 79

E. And who are able to consummate the marriage 81

(1) What constitutes consummation 81

Baxter 81
Wilkinson 81

(2) Inability to consummate 82

(a) Physical 82

Foster 82

(b) Invincible repugnance 84

Heil 84
Greenlees 87
Gajamagan 89
Foisy 89

V. Defences to a Nullity Action: Approbation or Insincerity 92

Hahlo, Nullity of Marriage in Canada 92

A. Knowledge 94

G. v. G. 94
B. v. B. 97

B. Conduct 98

R.E.L. 98
W. v. W. 102

C. Delay and improper motive 106

Clifford 106
Norman 108

D. The effect of petitioner's own impotence 110

Pettit 110

IV. The Nullity Decree 113

A. Jurisdiction and other matters 113

B. Conflicts problems 113

C. Economic consequences 113

D. Children 113

CHAPTER THREE: DIVORCE

1. Grounds 114

A. General 114

Green, "The Divorce Act of 1968" 115
Divorce Act 115

B. Immediate relief: the fault grounds 117

(1) Adultery 117

(a) What it is 117

Orford 117
Dennis 120

(b) Proving adultery 122

(i) Standard of proof 122

(ii) Methods 122

1. Physical condition 122

2. Circumstances 122

Little 123

3. Admissions 128

Divorce Act 128
Evidence Act 129
Ewasiuk 130
Veysey 131

4. Other decrees 132

Coles 132

(2) Other sexual misconduct 134

Divorce Act 134
G. v. G. 135
Guy 137
T. v. T. and W. 138

(3) Cruelty 140

Divorce Act 142

(a) Relevance of the common law alimony standard 142

N. v. N. 142

(b) Grave and weighty conduct 148

Knoll 148

Feldman 149
Wittstock 151
Luther 155
Shumila 157
Hattie 161
Elbaz 162
Rishel 164

(c) The relevance of intention 165

Williams 165
Anderson 171

(d) The time problem 174

C. Delayed relief: marital breakdown 174

Divorce Act 174

(1) Imprisonment 175

(2) Addiction 175

(3) Disappearance 176

(4) Non-consummation 176

Chirayath 176

(5) Living separate and apart in the absence of other grounds 178

(a) "Separate and apart" 179

J.B. v. A.W.B. 179
Deslippe 183
Boechler 184
Lachman 185

(b) Desertion 189

(i) Without just cause 189

Sullivan 189
G. v. G. 193
Bird 195
Slon 198

(ii) ...And with the intention to remain apart permanently 199

Lilley 200

(iii) The problem of mutual desertion 202

Price 202

(iv) Termination of desertion 204

Digiacinto 204
Richards 205
March 208

D. Proposals for reform 210

Divorce Act Amendment Act 210

II. Bars and Defences 211

A. The possibility of reconciliation 211

Divorce Act 211

Irving & Irving, Conciliation Counselling 213

B. Absolute bars applicable to all grounds 215

(1) Collusion 215

Divorce Act 215
Sopinka, "The Divorce Act 1968, Collusion Confined" 216
Gillett 221

(2) Fraud 222

Fromovitz 222

C. Discretionary Bars 226

(1) Connivance 226

Divorce Act 226
Report of the Special Joint Committee on Divorce 226

Berger 227

(a) Consent 229

T. v. T. 229

(b) The problem of investigation 231

Pearl 231
Hechter 233

(c) Termination of connivance 238

Godfrey 238

(2) Condonation 241

(a) Introduction 241

Divorce Act 242

(b) The common law 243

Knowledge, forgiveness and re-instatement 243

Leaderhouse 244
Aucoin 250

(c) The effect of the Divorce Act 252

Divorce Act 252
Boivert v. Marineau 253
Nolan 257
Ross 257
Blackburn 258
Brown 259
Blue 261

(3) The exercise of discretion 263

Divorce Act 263
Blunt 263

D. Special bars applicable only to s. 4 grounds 264

Divorce Act 264
Raggett 265
Savage 267

E. The problem of insanity 269

B. v. B. 269

III. Nature and Consequences of Divorce 271

A. Jurisdiction 271

Divorce Act 271

B. Recognition 272

Divorce Act 272

C. Consequences 273

(1) Status 273

Divorce Act 273
Baia 274
Rivera v. Barahona 276

(2) Economic 277

(3) Children 277

(4) Costs 277

Bregman 278

Andrews 280

CHAPTER FOUR: ECONOMIC RELATIONS BETWEEN "SPOUSES"

I. Introduction 283

II. Ownership of Property 285

A. Introduction 285

Law Reform Commission of Canada, Family Property 285
Zuijdwijk, A Note on the Standard Property Regime in Quebec 299

B. The law prior to the F.L.R. Act; the law after: the use of trusts 304

Murdoch 305
Rathwell 312
Pettkus v. Becker 313
Murray v. Roty 324
Marvin 328

C. The F.L.R. Act 330

(1) Provisions applicable to determining ownership of all types of assets 330

(a) Standing 330

(b) Trusts and presumptions of trust 331

(c) Private agreements: domestic contract 331

(2) Family assets and division of family and non-family assets 332

(a) What is a family asset? 333

(b) Powers of the court in dividing property 334

(i) General 334

(ii) In relation of family assets 335

(iii) In relation to non-family assets 336

D. The case law 337

(1) What is a family asset? 337

Bregman 337
Re Leatherdale 341
Ling 341A

(2) When will the court make an unequal division of family assets? 342

(a) The effect of gifts 343

Silverstein 343
Bregman 347
Weir 348
Ling 349
Piskor 349

(b) Equal division inequitable in the circumstances 351

Weir 351
Ivanovich 353

(3) When will the court make a division of non-family assets? 355

(a) The impact of s. 4 355

Silverstein 356
Bregman 357
Re Young 359
Collville-Reeves 360
Leatherdale 362

(4) The impact of s. 8 365

Silverstein 365
Re Young 366
Leatherdale 367
Van de Mark v. Walton 370
Palachik 371

(4) The problem of agreements between the parties 375

Family Law Reform Act 375

(a) Agreements not in compliance with s. 54 377

Seibt 377
Burton 378
Miller 379

(b) Agreements that are formally valid by s. 54 381

Deroon 381
Couzens 383
Mirus 383
Trottier v. Altobelli 384
Lamers 385
.....

E. Reform 386

Pearlman, Reforming the F.L.R.A. 386

III. Mutual Duty of Maintenance 391

A. While Married or Cohabiting 391

(1) The law prior to the F.L.R. Act of 1978 391

(2) The Family Law Reform Act of 1978 392

B. On Breakup of Marriage or Cohabitation 392

(1) Who can claim: the problem of "common law" spouses 392

Family Law Reform Act 392
Re Stoikiewicz and Filas 393
Warwick v. Ministry of Community & Social Services 395
Sanderson v. Russell 397

(2) When can claim be made? 398

(a) Nullity 398

(b) Divorce 399

Divorce Act 399
The Interaction of the Divorce Act and the F.L.R. Act 400
Note on the Powers of the Divorce Court 400

Farquar 402

(c) On death of one of the parties 403

Succession Law Reform Act 403

(3) What types of order can be made 403

(a) Non-monetary 403

The special problem of possessory rights in the matrimonial home 404

(i) Definition of matrimonial home 405

(ii) Protection accorded a spouse in the matrimonial home 406

Re Kozub and Timko 406

(iii) Powers of court to alter occupancy rights 409

Janssen 409
Partition Act 412

(b) Money Awards : Types 412

(i) Periodic payment orders 412

Family Law Reform Act 412
Divorce Act 413

(ii) Lump sum 413

(iii) Secured 413

Family Law Reform Act 414
Divorce Act 414

(4) Factors affecting momentary awards 414

(a) Introduction 414

Law Reform Commission of Canada
Maintenance or Divorce 414
Family Law Reform Act 421
Divorce Act 422

(b) When will a court order that a lump sum be paid 423

Murdoch 423
Shaffran 424
Feldman 426
Chaffery 427
Brett 428

(c) Factors (other than conduct) affecting quantum of award 431

Davis 431
Williams 434
Barnard 435
Messier v Delage 437
Silverstein 443
D. v. D. 446
Cohen 447
Elasoff 449
Cure 451

(d) The significance of conduct 453

(i) Under the F.L.R. Act 453

West 453
McCabe 454
Rocha 456
C. v. C. (No. 2) 458

(ii) Under the Divorce Act 458

Murdoch 459

(5) Variation of awards 460

Family Law Reform Act 460
Divorce Act 461
Harrington 461
Johnstone 464
McQuilkin v. Dawson 468
Neal 470
Jancov 471
Gergely 474
Gigantes 476

C. Special Problems: Contracting Out, Welfare and Problems of Federalism 477

(1) Contracting out of maintenance 477

(a) While parties are alive 477

(i) During cohabitation or upon separation 477

Family Law Reform Act 477
Mance 478

(ii) Where marital status is terminated by divorce 480

Newman 480
McMillan 487
Webb 492

Note on separation agreements 497

(b) Contracting out of claims against a spouse's estate 497

Family Law Reform Act 497
Succession Law Reform Act 497

(2) Welfare

General Welfare Assistance Act 498
Annual Report, Ministry of Community and Social Services for the Fiscal Year Ending March 31, 1982 501
Family Benefits Act 502
Annual Report, Ministry of Community and Social Services for the Fiscal Year Ending March 31, 1982 506
Diamond, "Philosophy of Welfare" 508

(3) Problems of federalism 513

Sniderman 514

CHAPTER FIVE: CHILDREN

1. Introduction 516

Children's Law Reform Act 517
Family Law Reform Act 518
Succession Law Reform Act 518
Divorce Act 519

II. Proving and Disproving Parenthood 519

Children's Law Reform Act 519
Re H and H 523
Re Rhan 528
Ministry of Community and Social Services and Tolls 530

III. The Right (or Privilege) to Raise or See One's Children: Guardianship. Custody, Care and Control, Access 532

A. Introduction 532

B. Private Disputes 534

(1) Custody 534

(a) Legislative framework 534

Children's Law Reform Act 534
Habeus Corpus 540
Divorce Act 541
Matrimonial Causes Act 542

(b) The genneral principles: what the academics have said 543

Foster and Freed, "Child Custody" 543
Katkin, Bullington and Levine, "Above and Beyond the Best Interests of the Child 548
Mnookin, "Child-Dustody Adjudication; Judical Functions in the Face of Indeterminacy 555

(c) Powers of the court 580

(i) Who has standing to apply for custody
Smith v. Sears 581

(ii) Award to a person not a party to the action 583

Re Fulford and Townshend 583

(iii) Joint custody order 585

Kruger 585
Fontaine 594
Zwicker v. Morine 595
Field 596

(iv) The effect of an agreement between the parties 599

Children's Law Reform Act 599
Family Law Reform Act 600
Colter 601

(d) Interim custody 601

Children's Law Reform Act 601
Divorce Act 602
Papp 602

(e) Permanent custody 604
(i) The impact of conduct 604

Divorce Act 604
Children's Law Reform Act 605
Note on "Kidnapping" 605
Cooney 606
Bezaire 610

(ii) Race 614

Hayre 614
Singh 616

(iii) Tender years and plans 617

MacDonald 617
Talsky 619
R v R 624
Mireault 631
Wakaluk 633
Romeyko 638
Bayda, "Procedure in Child Custody Adjudication 640

(f) Custody after death of natural guardian 645

Children's Law Reform Act 645

(2) Disputes between parents and third parties 646

CLRA 646
Hepton v. Maat 646
J. v. C. 649
Re Moores and Feldstein 653
Delvenne v. Nabbie 661

(3) Access 664

Children's Law Reform Act 664
Alder 666
Boileau 671
Adoptation of a Child by M 673

C. Disputes involving the state or coercive agency 676

(1) State intervention: the "Pure welfare" approach 676

Manson, "The Ontario Child Welfare Act of 1965" 676
Child Welfare Act 682

(a) General 682

(b) Jurisdiction 683

(c) Process 687

(d) Powers on making a finding 692

(e) Accountability: review and appeals 694

Richardson, Unpublished paper 700
Ministry of Community and Social Services, 51st Annual Report 706
Re C.C.A.S. and Pamela M. 708
Re Brady Infants 719
C.A.S. of Winnipeg v. Molyneux and Porteous 721
Tom v. Winnipeg C.A.S. 726
Note, "The Custody Question and Child Neglect Hearings" 728
Re Cordes - Saathoff at al and C.C.A.S. of Metro Toronto 735
Re D.L.C. and C.W.C 738

(2) State intervention: the quasi-welfare approach 741

Juvenile Delinquents Act 741
Young Offenders 745

IV. Adoption 759

A. The statutory scheme 759

Child Welfare Act 759
L.S.U.C. Report 761
Ministry of Community and Social
Services, 48th Annual Report 774

B. Consent of natural parents 775

O'Connor v. A. & B. 775
Director of Man. Child Welfare v. Y. 777
L and L v. Legal Aid Manitoba 780
Racine v Woods 780
Re Winsor 783
Re Sobering et al and Sergeant 786

C. The religious factor 788

Petch, "Re Lamb Religious considerations
in Ontario Adoptions" 788
Re Lee 792

D. The search for natural parents or child 794

Child Welfare Act 794
Ferguson v. Director of Child Welfare 796

E. Access After Adoption 798

C.G.W. v. M.J. et al 798
William v. Hillier and Hillier 802

V. The Parental-Child Relationship 808

A. Parental Control 808

O.L.R.C., Report 808
Re D. 809

B. Economic Relations 812

(1) Parental obligations to child 812

(a) General 812

Ontario Law Reform Commission,
"Report on the Age of Majority" 812

(b) Legislative framework 815

Family Law Reform Act 815
Child Welfare Act 819
Divorce Act 820

(c) The work of the courts 821

Waters v Nicholls 821
Re Dolabaille and Carrington 823
Clark 826
Janzen 828
Harrington 830
Gartner 832
Hock 835
Walls v. Hanson 837

(d) The effect of death 838

Succession Law Reform Act 838
Re Pfrimmer 845

(2) The child's duty to maintain his parents 846

Family Law Reform Act 846
Succession Law Reform Act 848
St. Joseph's Health Centre 851

CHAPTER SIX: PROTECTION OF THE FAMILY UNIT AGAINST INTERFERENCE BY THIRD PARTIES

I. Between Husband and Wife 853

Ontario Law Reform Commission Report on Family Law, Part I: Torts 853

Kelly, "The Case for Retention of Causes of Action for Intentional Interference with the Marital Relationship" 859

Leaphart and McCann, "Consortium: An Action for the Wife" 863
Ontario Law Reform Commission Report on Family Law, Part I: Torts 869
Family Law Reform Act 872

II. Between Parent and Child 872

Ontario Law Reform Commission Report on Family Law, Part I: Torts 872
Family Law Reform Act 875